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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 48

PACIFIC STATES BOX & BASKET COMPANY,
A CALIFORNIA CORPORATION,
Appellant,

vs.

S. T. WHITE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

APPELLANT'S REPLY BRIEF

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Counsel for Appellant.

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REPLY BRIEF

Appellant desires to comment briefly on certain points raised in Appellees' brief.

Point I.

Appellees contend that appellant is not in a position to maintain this suit because its interest is indirect.

In addition to the cases cited in the principal brief, appellant desires to call to the attention of the court the case

of *Station WBT* vs. *Poulnot*, 46 F. (2d) 671. The holding of that case is that a broadcasting company, not doing business in the State of South Carolina, had a sufficient interest in radio listeners to maintain a suit enjoining the collection of the South Carolina tax on radio receivers on the ground that the tax was unconstitutional.

No appeal was taken from this decision.

This case, together with those cited in appellant's reply brief to appellees' Statement Opposing Jurisdiction, to which reference is made, and the cases cited in the main brief clearly sustain appellant's right to attack the validity of the orders and statutes involved.

The question of whether appellant is licensed to do business in the State of Oregon is not properly before the court as the issue has not been raised by any pleading of defendant.

A foreign corporation is presumed to have complied with the conditions precedent, contained in the State Statutes before engaging in business therein and the complaint need not allege its compliance. 18 Fletcher Cyc. of Corporation (2d) 35 and cases cited. 18 Fletcher (2d) 79 and cases cited.

Point IV.

Appellees have cited *Detweiler* vs. *Welch*, 46 F. (2d) 75 and *Marshall* vs. *Department of Agriculture*, 44 Id. 440, 258 Pac. 171, in support of their contention that the orders in question constitute a reasonable exercise of the police power. In the former case the court said that regulation of the marketing of farm products was recognized as a legitimate exercise of the police power—provided such regulation is not in conflict with an Act of Congress. The case of *Van Winkle* vs. *Meyer*, 21 Ore. Ad. Sh. 85, is directly contra on the issue of the right to regulate marketing of farm products, and, furthermore, in the case at bar the

orders in question do conflict with an Act of Congress as we have pointed out in our principal brief.

In the *Marshall case*, the case was reversed on the issue of the reasonableness of the standards, which is the point involved in the case at bar.

Appellees argue at page 14 of their brief that *Sec. 18-2902 Oregon Code 1930*, is a legislative finding that it is necessary and proper that standards be promulgated. That is not true. The express language of the statute provides that the Board is *authorized* to promulgate standards, if after investigation the Board believes it necessary. To be a legislative finding the statute, at least would have to *direct* that standards be promulgated, not merely *authorize* and empower the fixing of standards.

Point V.

This point of appellees deals with the conflict between the State Statutes and orders, and the Federal Statute covering berry containers. In addition to the cases cited in our main brief, and the cases cited by appellees, we desire to cite: *Napier* vs. *Atlantic Coast Line Railway Co.*, 272 U. S. 605, 71 L. Ed. 432.

In the Napier Case this Court had under consideration the matter of whether State Statutes requiring certain equipment on locomotives could be sustained. The court held that that although the State Statutes were within the police power and designed to protect and promote the health of railroad employees, nevertheless it could not be sustained because the Interstate Commerce Commission has authority to specify equipment of locomotives. This decision was reached even though no equipment of a similar type was specified by the Interstate Commerce Commission or by Congress. This case apparently goes much farther than the conflict between congressional legislation and State regulation of berry boxes in the case at bar. In this question of conflict, we are not relying upon a general con-

gressional statute regulating fruit containers but the congressional statute involved actually regulates containers for berries and is in conflict with the State statute.

This Court said in the case of *Missouri Pacific Company* vs. *Porter*, 273 U. S. 341, 364, 71 L. Ed. 672-675, 47 S. Ct. 383:

> "Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other legislation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and if that power has been exerted state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

The case of *Gilvary* vs. *Cuyahoga Valley Railway Company*, 292 U. S. 57, 78 L. Ed. 1123, cited by appellees is readily distinguishable from the cases we have cited. In the *Gilvary case* the claim was for an injury to an employee of the railroad company when the party had contracted to be bound by the Ohio Elective Workman's Compensation Law, and the holding of the court is that the right of the employee to recover, since his duties were wholly intrastate his right to collect damages from the carrier does not spring from the Federal Acts but from the law of the State.

The *Gilvary case* expressly recognizes that as far as safety equipment is concerned the Federal Acts operate to exclude State regulation, whether consistent, complemenary, additional or otherwise.

Point IX.

It is submitted that the matter of unlawful delegation of legislative power may be properly raised by appellant on this appeal under the following assignments of error:

Assignment No. 1.—This assignment is to the effect that the court erred in refusing to enjoin the defendants from enforcing the orders under attack. Obviously if the legislature could not legally delegate the authority to the appellees the appellees could not lawfully make the orders complained of and they should have been enjoined.

The same argument applies to specification No. 2 which is based on the failure of the court to enjoin the enforcement of the particular statutes involved so far as they attempt to sustain the orders specified for containers for berries.

Specification No. 6 is that the court erred in refusing to hold that the orders and statutory provisions were violative of the constitutional rights of the plaintiff. Under this specification of error we believe that the matter of delegation of authority could be properly raised as unlawful delegation is prohibited by the Constitution.

The same point we believe could be validly raised with reference to specifications 7, 8, and 9.

While Rule 27, paragraph 4, provides that errors not specified will be disregarded, it further provides that the court at its option, may notice a plain error not assigned or specified. If the court concludes that the matter of delegation of authority does not properly come within the errors specified it is submitted that it is a *plain* error of a serious and controlling character, as it goes directly to the power of the appellees, and we believe should be noticed by this Court.

Respectfully submitted,

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(7032-c)